SURROGATE'S COURT: NEW YORK COUNTY

----------x

In the Matter of the Trust u/A

SIDNEY SOLOMON,

Grantor.

File No. 2012-1157

----------x

G L E N, S.

At the call of the calendar, the court granted the amended petition of Ronni H. Macklowitz, Daniel S. Macklowitz, and Laurie Macklowitz Selfon for an order declaring that Ronni H. Macklowitz and Ernest J. Miller duly resigned as trustees of a certain irrevocable life insurance trust, and that Daniel S. Macklowitz and Laurie Macklowitz Selfon are the duly appointed trustees of the trust. The court denied the petitioners' request for injunctive relief prohibiting the prosecution of a certain proceeding in Florida pertaining to the trust.

This matter concerns the trust created by Sidney and Elayne Solomon under an agreement dated May 23, 1990. Elayne died in 1991. The surviving grantor's two children, Ronni and Jeffrey, and three grandchildren, Daniel, Laurie, and Samantha, are discretionary income and principal beneficiaries during Sidney's lifetime. Upon his death, 90% of the trust is distributable outright to Ronni, and the balance continues in further trust shares for each of her children, Daniel and Laurie. All five beneficiaries are adults.

Ronni was the original trustee, and the only successor named in the instrument is Ernest J. Miller. Article 7.6 of the instrument provides for Ernest's appointment if Ronni "fails to qualify, dies, resigns, becomes incapacitated or otherwise ceases to act as Trustee hereunder. . . ." As discussed below, Ronni resigned as trustee, and although the precise effective date of her

resignation is not clear, it is clear that she ceased to act as a trustee at some point in 2006 and Ernest thereby became her successor.

The trust agreement allows a trustee to resign "by written notice to any co-trustee then serving and the current adult income beneficiary or beneficiaries of the trust" (Article 5.1). Resignation becomes effective "upon the appointment and qualification of the successor Trustee." In his verified answer to the petition, Ernest states (¶ 4) that sometime after the winter of 2006 he received a copy of Ronni's written notice of resignation and agreed to serve as her successor. Ernest subsequently also decided to resign and verifies that he gave Jeffrey written notice of his resignation, which is dated December 27, 2006, with a request that Jeffrey provide copies to the appropriate persons. It is unclear exactly when copies of his resignation notice were delivered to the other beneficiaries of the trust, except Jeffrey states in his answer to the amended petition (¶ 34) that he forwarded a copy to Daniel's wife, the petitioners' former attorney, in January 2010. What is clear, however, is that copies of both Ronni's and Ernest's resignation notices were delivered to all the other adult beneficiaries no later than August 2011, as attachments to a complaint in a Florida proceeding that Jeffrey served upon Ronni, Laurie, Daniel, and Samantha, concerning the subject trust.

Article V of the trust agreement permits the appointment of one or more successor trustees by a majority of adult income beneficiaries "[u]pon the resignation of a Trustee, and if no successor is appointed hereunder. . . ." [1] Such appointment is to be made "by written instrument delivered to the then acting Trustee." Ernest purported to appoint Jeffrey as his successor by a writing dated December 27, 2006 in which he stated, "I Acknowledge and confirm

[1] As indicated above, the only successor appointed in the instrument was Ernest Miller.

the appointment of Jeffrey Solomon as successor Trustee." [2] More than three years thereafter, Jeffrey purported to appoint Russell Williams to serve with him as co-trustee, in a written instrument dated April 26, 2010.

It is undisputed that the purported appointments of Jeffrey Solomon and Russell Williams as successor trustees were made without a written designation from a majority of the adult income beneficiaries. The appointments were therefore invalid for failure to comply with the terms of the trust agreement (*see Matter of Const. and Reformation of Matthews Trust No. 1,* 61 AD3d 511, 512 [1st Dept 2009] ["unless ambiguous, the plain language of the trust document must be given full force and effect"]; *Matter of Morgan*, 13 Misc 2d 214 [Sup Ct New York County 1958] [strictly construing trust provision for appointment of successor trustee, despite evidence of grantor's intent for appointment of another]).

In January 2012, after the effective date of both Ronni's and Ernest's resignations, three of the five adult beneficiaries appointed Daniel and Laurie Macklowitz as successor trustees. The appointment was made in a written instrument signed and acknowledged by the three petitioners here, and delivered to Ernest, Russell, Jeffrey, and Samantha. The appointment fully complies with the mechanism set forth in the trust agreement for the appointment of successor trustees, and, accordingly, Daniel and Laurie became and continue to be the trustees of the trust.

Respondent Jeffrey has asserted eight affirmative defenses to petitioners' request for a declaration that he and Russell are not the trustees of the trust, all of which are dismissed as discussed below.

---

[2] The statement recites that it is in compliance with paragraph 7.6 of the trust agreement. Paragraph 7.6, however, only nominates Ernest to succeed Ronni as trustee, and nowhere authorizes Ernest to appoint a trustee.

First: Respondent asserts that the petition fails to state a claim upon which relief may be granted. He gives no further explanation. A request for a declaratory judgment is a form of relief expressly allowed under CPRL 3017 (b). Given the conflicting claims to the office of trustee, the clear authority of the Surrogate's Court over the appointment and resignation of trustees of inter vivos trusts (*see* EPTL Article 7; SCPA Article 15), this inscrutable defense is dismissed.

Second: Respondent asserts that the claims are barred by the statute of limitations on the theory that Jeffrey has served as trustee since at least January 2007. Respondent has not identified any applicable statute of limitations, nor can the court. The defense is dismissed.

Third: Respondent asserts that the matter should be dismissed pursuant to CPLR 3211 (a) (4) on the ground that there is another matter pending in Florida where all the issues in the case may be resolved. That proceeding, brought by Jeffrey and Russell as purported trustees, seeks to reform this irrevocable trust to deprive Ronni of her remainder interest. After a review of the Florida pleadings, this court finds that the issue of the identity of the trustees (and, therefore, the standing of Jeffrey and Russell to bring the Florida proceeding) is not squarely before the Florida court. In any event, dismissal under CPLR 3211 (a) (4) is not mandatory, and this court in its discretion dismisses this defense.

Fourth: Respondent asserts that this proceeding should be stayed pending the outcome of the Florida proceedings. He asserts no basis for staying this proceeding and the court sees none.

Fifth: Respondent asserts that this proceeding should be dismissed for failure to join indispensable parties, particularly the surviving grantor, Sidney Solomon. The court rejects this contention. The grantor is not a beneficiary of the trust, which is irrevocable, and therefore has

no further interest in the trust.[3] All interested parties have been joined, and the defense is dismissed.

Sixth: The respondent asserts estoppel and ratification. Respondent has not pleaded a change of position to his detriment as is required to sustain a defense of estoppel (*e. g. Flores v City of New York*, 62 AD3d 506 [1st Dept 2009]). Nor has he pleaded a change of position in reliance on the alleged assent or non-action of petitioners, as is required for ratification (*see City of Rochester v New York State Rys.*, 127 Misc 766 [Sup Ct New York County 1926]). Although respondent asserts that he has paid premiums from his own funds for the life insurance held by the trust, he has a claim against the trust estate for those payments. Further, his purported appointment as trustee carried no obligation that he pay premiums from his funds; any such payments could not have been made in reasonable reliance on the absence of an earlier objection by petitioners to his assumption of the office.

Seventh: Respondent asserts that the petitioners' claims are barred by the doctrine of unclean hands. The bad acts he alleges petitioner Ronni performed are unrelated to the administration of the subject trust. Since application of the doctrine is limited to situations where the conduct complained of is directly related to the transaction at issue, this defense is also dismissed (*Welch v DiBlasi*, 289 AD2d 964 [4th Dept 2001]).

Eighth: (numbered in the Answer as "Seventh"): Respondent asserts that the claims are barred by laches. He does not allege that he was prejudiced by any delay, however, as is required to sustain a defense of laches (*e.g. Feldman v Metropolitan Life Ins. Co.*, 259 AD 123 [1st Dept

[3] The court observes that, if the grantor did have an interest, it would be includible in his taxable estate under IRC § 2036, ordinarily not the intention of the creator of an irrevocable insurance trust.

1940]). This defense is dismissed.

The court denies the request for an injunction prohibiting Jeffrey and Russell from pursuing their claims in Florida and denies the request for an injunction prohibiting Nationwide Life Insurance Company, the issuer of the policy held in the trust, from making any transfer from the policy or from cancelling the policy. The trustees are free to assert Jeffrey's and Russell's lack of standing in the Florida proceedings in the court where the action is pending, and the trustees have legal remedies should the insurance company breach its contract.

Lastly, the court denies petitioners' request to order an accounting by Jeffrey and Russell, in view of the fact that the sole asset of the trust is a life insurance policy which has not matured and transactions in the trust are likely minimal. Petitioners may renew the application on a showing that an accounting would be in the interests of the trust.

This decision constitutes the order of the court.

SURROGATE

Dated: June 27, 2012